90-1630

Supreme Court, U.S.
FILED
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No.

IN THE
Supreme Court of the United States
October Term, 1990

ON LEONG CHINESE MERCHANTS ASSOCIATION BUILDING,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether real property is subject to forfeiture under 18 U.S.C. §1955(d)?

2. Whether the granting of summary judgment following a stay of discovery trampled on claimant's due process rights?

LIST OF PARTIES

Other than the subject building and the United States of America, the only party to this action is the On Leong Chinese Merchants Association—an Illinois not-for-profit corporation—which, as owner of the property, is the claimant thereto.

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Petitioner, On Leong Chinese Merchants Association, the claimant in this *in rem* forfeiture proceeding, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Seventh Circuit, affirming the judgement entered against the subject property by the United States District Court for the Northern District of Illinois.

OPINION BELOW

The opinion of the Court of Appeals appears in the appendix hereto at pp. 1a-23a.

JURISDICTION

The date of the judgement of the United States Court of Appeals for the Seventh Circuit was November 14, 1990. The time to file this petition was extended to April 15, 1991, by order of Justice Stevens. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

1. 18 U.S.C. §1955

2. Rule 56, Fed.R.Civ.P.

3. United States Constitution, Amendment V

The texts of these provisions appear in Appendix B.

STATEMENT OF THE CASE

A. Procedural History Of The Action

On June 15, 1988, the United States Attorney's Office for the Northern District of Illinois filed a Complaint seeking forfeiture of the On Leong Chinese Merchants Association Building pursuant to 18 U.S.C. §1955(d). The government also obtained and executed a warrant of seizure. The contents of the building were removed to storage. On June 27, 1988, the On Leong Chinese Merchants Association (hereinafter "On Leong")--an Illinois not-for-profit corporation--filed a claim as owner of the seized property.

On August 22, 1988, with no discovery having been accomplished, the government's motion to stay discovery was granted. The basis for this stay was the pendency of a

related grand jury investigation. Shortly thereafter, the government filed a motion for summary judgment. On Leong responded with a motion, pursuant to Rule 56(f), Fed.R.Civ.P., to hold the summary judgment proceedings in abeyance because the criminal investigation had made it impossible to obtain the evidence necessary to oppose the motion.[1]

In its reply brief in opposition to that motion, the government agreed to a stay of the summary judgment motion for all seized property except the On Leong building.[2] On May 9, 1989, On Leong's motion for a continuance of the summary judgment proceedings on the building was denied. The district court, in a less-than-two-page decision held that depositions of the two agents whose affidavits formed the basis of the summary judgement motion would be "futile" and that claimant's inability to obtain the testimony of its own witnesses was not "a valid basis for interrupting the civil action."[3]

Both sides then completed the briefing of the summary judgment motion. On October 13, 1989, the government's motion for summary judgment on the On Leong building was granted and, on January 8, 1990, a final judgment and a decree of forfeiture against the On Leong building was entered.

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1. The many Chinese-Americans subpoenaed to testify in front of the grand jury invoked their Fifth Amendment right and, thus, even those witnesses technically within claimant's control declared their unavailability for purposes of this case.

2. This included $323,427.96 in currency and cashiers checks totalling $2,500.

3. The court, without so much as acknowledging the Fifth Amendment rights of these potential witnesses, asserted that "[c]laimant essentially argues that it possesses the relevant information but is unwilling or unable to submit it."

B. Description Of The Subject Property

The On Leong Chinese Merchants Association Building which is the subject of the instant *in rem* forfeiture action is an historic three story, elaborately decorated structure, located in Chicago's Chinatown. Its history and significance, both architectural and cultural, is an integral part of these proceedings. According to a 1988 report issued by the Chicago Landmark Commission, the history of this spectacular building began with the first Chinese immigrants to settle in Chicago. Among these were Harp Lee, who opened a laundry on Madison Street in 1873, and T.C. Moy, a grocer who established his business on Clark Street in 1874. It was the descendants of these two men, who "felt the force of recrimination"

> [w]hen the Chinese government responded to the Exclusion Act by boycotting all American-made products in 1905. . . . In response to the poor treatment they were suddenly receiving, and due to their expulsion to poor, high crime neighborhoods, the Chinese established organizations variously known as societies, clans, or tongs. In his (University of Chicago PhD) dissertation of 1926, Dr. Tin-Chu Fan described the foundation of these organizations in Chicago and their intention to "protect members . . . and help them in sickness and poverty, to assist them to become familiar with the laws and customs of their adopted country, and yet not to forget their fatherland, language, and family codes." One of the most prominent of these new organizations was the On Leong ("Prosperity peaceful conduct") Merchants Association. . . .
>
> By 1911, the Chinese population of Chicago was over 1,800. In that year the federal government announced the construction of a new federal building . . . in the heart of the Chinese district. . . . The businesses that participated in the [On Leong] association moved from Clark Street to Cermack and Wentworth *en masse* in February, 1912, and

the area was immediately proclaimed the "New Chinatown. . . ."

The On Leong Merchants Association made itself the center of cultural activity in the wake of the foundation of New Chinatown. It was responsible for a Chinese language after-hours school for children, provided assistance for new immigrants, organized community activities and celebrations, and established an informal judicial system that settled disputes between its members. In order to expand its services, the association decided in 1926 to build a new headquarters building that would consolidate its operations under one roof and provide a symbol of Chinese heritage to those outside the community. . . .

The [new] building was constructed on a steel and concrete frame and clad entirely in brick and terra cotta. . . . Its elevation is reminiscent of the Chinese Theater at the Columbian Exposition in its symmetry and in the arrangement of its elements, particularly in having a facade that is framed by towers whose design was inspired by the profile of the pagoda. . . . Similarly, the centrally placed main entrance was given emphasis by a canopy over the first floor, the rhythm of the piers on the upper floors, and the shape of the roofline above. The open loggia on an upper floor is an element common to multi-story commercial buildings in Hong Kong and Canton, and the choice of the pier over the column to support the loggia is a regional variation favored in Kuangtung province.

The first floor of the On Leong building is clad entirely in terra cotta and caped with a frieze of decorative panels. Terra cotta was also used for the brackets and railings of the loggia, to frame the windows and form the tops of the towers, and for the cresting of the rear stair tower. . . . The designs were based on Chinese prototypes. . . . Animals, figures, foliage, and geometric patterns represent good fortune, long life, and the six Confucian Virtues: Li, propriety; Yee, moral courage; Yun, physical courage;

Jen, charity; Chu, the pursuit of knowledge; and Len, temperance. The animal figures have their faces turned toward either the viewer or each other; in order to avoid a symbol of bad luck, they were never allowed to have their backs turned on one another. . . . The details were given polychrome glazes with red, the traditional color of joy, and jade green, symbolizing affluence, as the predominant colors; white, the color of death and mourning, was avoided.

Stores flank the elaborate terra cotta main portal at the center of the first floor. . . . The portal opens on a large foyer with a vaulted ceiling and a staircase that leads to a lobby and the upper floors. The second floor was originally designed to accommodate a residential hotel, a lounge, offices, and facilities for the Chinese language after-hours school. A kitchen, dining room, and three large meeting halls were built on the third floor. One of the third floor halls was equipped with a shrine, trimmed in marble and precious woods inlaid with gold and mother-of-pearl. . . . [T]he shrine room was decorated with tapestries, gilded screens, figurative reliefs in bronze, an[d] porcelain vases that dated to the Ming Dynasty (1368-1644). The altar held a painted image of Gwon Gun, an ancient hero venerated as a soldier and philosopher; the altar was flanked by oil portraits of two later military and political "liberators," George Washington and Dr. Sun Yat-sen. . . .

The efforts of the On Leong Merchants Association produced a building that has a commanding presence in its neighborhood and created a distinctive element within the streetscapes of the city. Its size, materials, colors, and design established a new sense of identity among the many ethnic communities of Chicago. Although forced to rely on designers from an alien culture, the association selected an architectural firm whose members were trained and equipped to interpret diverse stylistic traditions. The result was the integration of traditional Chinese details with an American interior plan, to produce an architectural state-

ment of ethnic community and institutional importance that has retained these connotations for more than sixty years.

C. The Claims Supporting Forfeiture

The government's summary judgement motion was predicated entirely on the affidavits of F.B.I. agents James Whitmer and George Ng, as well as Chicago Police Department reports which formed the basis for many of Whitmer's claims. Attached to the Whitmer affidavit, the first police report described arrests made for gambling on the second floor of the On Leong building on September 2, 1984. Whitmer averred that, in that incident, the police allegedly arrested sixteen people and seized "chips, buttons, dice and an amount of currency." An examination of the report, but not Whitmer's affidavit, revealed that the "amount of currency" was only $429.

The second police report described a February 22, 1985, raid on the second floor of the On Leong building. At that time, the police arrested eleven people and seized $3,805 in currency from a safe, another $1,451 in currency from the persons of four players, chips supposedly worth $30,000, buttons, and bowls. The final police report described the execution of a third search warrant on March 14, 1986, this time in a basement room of one of the first floor stores, with direct access from the street. On this occasion, the police arrested eighteen people and seized $56.32 from the gaming table and an additional $2,093 from the persons of six players, as well as chips, markers, and two felt Fan Tan cloths.

Whitmer claimed that four individuals were arrested on each of these three occasions, while nine other individuals were arrested on two occasions. Although there

was no indication in the police reports that these individuals were anything more than bettors, Whitmer sought to have the inference that they were running the game drawn from the fact that the game "requires at least one dealer and one banker to conduct the gaming at each table." Neither the police reports, nor Whitmer's affidavit, contained any information about the ultimate dispositions of the cases against the arrestees, nor did these documents in any way, other than location, link the games to the On Leong Merchants Association.

Both Whitmer and Ng also described a visit to the On Leong building made by Ng on evening of April 19, 1988. To enter what he described as the gaming room, Ng passed through "wire mesh gates," past two "guards," and under a television monitor. He proceeded into a room in which he claimed to have observed "at least 50 bettors and/or spectators" and "Chinese gambling games of Fan-Tan and Pai Gow" being played. He bought $500 worth of chips and placed eight or nine wagers, receiving 90% of his winnings when he won, and claimed that he observed a shift change of workers at the tables and others placing wagers. Ng returned the following evening, and claimed that "the same gambling activity was being conducted, although there appeared to be fewer people present." There was no indication in the record that, on either day, gambling occurred anyplace other than the one room.

Shortly after Ng's second visit, Whitmer participated in the execution of a search warrant for the On Leong premises. He observed what he perceived to be gambling equipment and found approximately 100 individuals present in the building at that time. Pursuant to the warrant, the agents seized currency totalling $323,427.96, $2,500 in cashiers checks, $76,119 in gambling chips, video equipment, documents relating to gambling activities, and

gambling paraphernalia. Whitmer further alleged that "much of [the] currency was found intermingled with gambling chips." The word "much" was nowhere defined, and there was no indication where the rest of the money was located when it was seized. Among the persons on the premises at that time were three individuals identified in the On Leong's 1988 annual report as being corporate officers. Only one of these individuals, Henry Fong, was linked to the purported gambling and even he was described as having *"appeared to be* a floor supervisor." (Emphasis supplied)

REASONS FOR GRANTING THE WRIT

A. The Law Concerning Whether Real Property Is Subject To Forfeiture Under 18 U.S.C. §1955(d) Is In Conflict.

Section 1955(a) criminalizes the operation of "an illegal gambling business" (*see p. 24a, infra*), while §1955(d) provides that

> *[a]ny property*, including money, *used in violation* of the provisions of this section may be seized and forfeited to the United States.... (*See* p. 24a, *infra;* emphasis supplied)

The question presented herein is whether the phrase "any property . . . used in violation" of §1955(a) can be interpreted to include real property, such as the On Leong building.

Two district courts have held that real property is not forfeitable under §1955(d). *See United States v. Building & Property Known As 123-125 E. Twelfth Street*, 527 F. Supp. 1167 (W.D.Pa. 1981) (two story commercial building owned by person convicted under §1955(a) and his wife as tenants in the entirety); *DiGiacomo v. United States*, 346 F. Supp. 1009 (D. Del. 1972) (two family

dwelling occupied in part by persons alleged to have used it for gambling business). A panel of the Eighth Circuit agreed, but that decision was later withdrawn, and a divided *en banc* court reversed the panel's determination. *See United States v. South Half of Lot 7 and Lot 8*, 876 F.2d 1362 (8th Cir.), *withdrawn*, 883 F.2d 53 (8th Cir. 1989), *on rehearing*, 910 F.2d 488 (8th Cir. 1990) (*en banc*) (13 properties, including residences).

The Seventh Circuit, presaging the holding of the majority of the Eighth Circuit, held that §1955(d) authorizes the forfeiture of real property and, therefore, it affirmed the judgement of forfeiture entered against the On Leong building. *(See pp. 16a-19a, infra)* The same conclusion has been reached by three courts. *United States v. Bonanno Organized Crime Family*, 683 F. Supp. 1411, 1459-1460 (E.D.N.Y. 1988), *aff'd on other grnds*, 879 F.2d 20 (2d Cir. 1989) (property of unspecified nature owned by one of the defendants and his wife); *United States v. Premises and Property at 614 Portland Avenue*, 670 F. Supp. 475 (W.D.N.Y. 1987), *aff'd*, 846 F.2d 166 (2d Cir. 1988) (per curiam) (nature of property not specified); and *United States v. Various Denominations of Currency*, 628 F. Supp. 4, 8 (S.D.W.Va. 1984) (one story structure housing tavern where gambling business was operated).

There are no other published opinions addressing this issue. In view of this deep division among the judges who have considered the issue, as well as the apparently increasing use of §1955(d) to forfeit real property and the historic and cultural importance of the On Leong building at issue here, it is respectfully submitted that the question of whether §1955(d) is to be given a broad or narrow construction should be reviewed by this Court.

Since it is generally safe to "assume that the legislative purpose is expressed by the ordinary meaning of the words used," *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), this Court has often stated that "[t]he starting point in statutory interpretation is the language [of the statute] itself." *United States v. James*, 478 U.S. 597, 604 (1986), *quoting, Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756 (1975) (Powell, J., concurring) (brackets in original). *See also United States v. Ron Pair Enterprises*, 489 U.S. 235 (1989).

When "the terms of a statute [are] unambiguous, judicial inquiry is complete, except 'in "rare and exceptional circumstances." ' " *Garcia v. United States*, 469 U.S. 70, 75 (1984), *quoting, TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978). *Accord Rubin v. United States*, 449 U.S. 424, 430 (1981). "In the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.' " *United States v. James, supra*, 478 U.S. at 606, *quoting, Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Where, however, the terms of a statute are ambiguous, legislative history can be an invaluable means of resolving doubts about the meaning of those terms. *Wisconsin Railroad Comm'n v. Chicago, Burlington & Quincy Railroad*, 257 U.S. 563, 589 (1922).

In determining which of these principles of statutory construction should be applied in this case, it is important to keep in mind the admonition that "[f]orfeitures, although said to be in the public policy, are a harsh and violent procedure." *DiGiacomo v. United States, supra,* 346 F.Supp. at 1011. As this Court has held, "[f]orfeitures are not favored; they should be enforced only when within both letter and spirit of the law." *United States v. One Ford Coach,* 307 U.S. 219, 226

(1938). *See also United States v. Estevez*, 845 F.2d 1409, 1411 (7th Cir. 1988). Accordingly, "strict compliance with the letter of the law by those seeking forfeiture must be required." *United States v. Certain Property Located at 4880 S.E. Dixie Highway*, 838 F.2d 1558, 1564 (11th Cir. 1988). *See also United States v. One 1977 Cadillac*, 644 F.2d 500, 501 (5th Cir. 1981). In short,

> courts faced with a novel or expansive reading of a forfeiture provision must review both the language of the statute and its legislative history to insure that such an expansion fits within both the "letter and spirit of the law."

United States v. South Half of Lot 7 and Lot 8, 876 F.2d 1362, 1365 (8th Cir.), *revs'd on other grnds*, 910 F.2d 488 (8th Cir. 1990) (*en banc*).

The holding of the Seventh Circuit in this case, as well as the other courts which it followed, that the term "any property," as it is used in §1955(d), is unambiguous and includes real property, has some visceral appeal. Certainly, as the majority of the *en banc* Eighth Circuit in *United States v. South Half of Lot 7 and Lot 8, supra*, 910 F.2d 488, noted, if "used without qualification, the word 'property' " seems to include both realty and personalty.[4] *Ac-*

4. In *United States v. South Half of Lot 7 and Lot 8, supra*, 910 F.2d 488, the majority of the *en banc* Eighth Circuit reasoned that

> [w]hen used without qualification, the word 'property' includes both real and personal property. *Fidelity & Deposit Co. v. Arenz*, 290 U.S. 66, 68 (1933); *Black's Law Dictionary* 1095 (5th ed. 1986); *Webster's Third New International Dictionary* 1818 (1981). Indeed, Congress' use of the word "any" to describe property "undercuts a narrow[er] construction." *United States v. James*, 478 U.S. 597, 605 (1986).

Id. at 489 (brackets in original). Since it failed to find any "compelling signal" that Congress intended a contrary result, the majority held that real property could be forfeited under §1955(d). *Id.*

cord United States v. Bonanno Organized Crime Family, supra, 683 F. Supp. at 1459; *United States v. Various Denominations of Currency, supra,* 628 F. Supp. at 5. (*See also* Opinion of the Seventh Circuit, pp. 16a-17a, *infra*)

However, as is demonstrated below, it simply cannot be said that, in §1955(d), the term "any property" is "without qualification." *First*, Congress chose to limit that term by requiring that the property be used "*in violation* of the provisions of this section." 18 U.S.C. §1955(d) (emphasis supplied). Logic dictates that a building is not actually used to run a gambling business in the same manner as gambling paraphernalia, or even cash, are used. Depending on the form the gambling takes, dice, cards, roulette wheels, chips, policy slips, cash, *etc.*, are indispensable. The building in which the gambling takes place, on the other hand, is as incidental to the success of the venture as, *e.g.*, the suit which the bookmaker or dealer wears. Thus, a building is not actually used "in violation" of the provisions of §1955(a).

While no court seems to have squarely addressed the issue of whether real property may, in fact, be used "in violation of" the provisions of §1955(a), some skepticism was expressed by Judge Copenhaver of the Southern District of West Virginia when he prefaced his interpretation of Congress' intent with the phrase "*to the extent that real property may be 'used in violation of'* §1955...." *United States v. Various Denominations of Currency, supra,* 628 F. Supp. at 6 (emphasis supplied).

Second, Congress chose to incorporate in §1955(d) the forfeiture mechanisms of the customs law which, as specified in §1955(d) and "[b]y their nature ... involve personal and not real property." *United States v. South Half*

of Lot 7 and Lot 8, supra, 876 F.2d at 1365. *See also DiGiacomo v. United States, supra*, 346 F. Supp. at 1011. As the panel of the Eighth Circuit in *United States v. South Half of Lot 7 and Lot 8*, noted, these customs forfeiture provisions

> are neither structured nor well tailored for the forfeiture of real property. Consequently, it would make little sense for Congress to incorporate these provisions unless it expected that the seizures under the provions [of §1955(d)] would be of personal property.

Id. at 1365. While the reference to the customs laws may not alone be dispositive of Congress' intent, it "clearly establishes a real question as to whether Congress intended real property to ever be forfeitable under [§1955(d)]." *Id.* In short, "if Congress had intended to include real property in the forfeiture provisions [of §1955(d)] it could easily have said so. It did not." *DiGiacomo v. United States, supra*, 346 F. Supp. at 1011. *But see United States v. Bonanno Organized Crime Family, supra*, 683 F. Supp. at 1459; *United States v. Premises and Property at 614 Portland Avenue, supra*, 670 F. Supp. at 477.

Given the ambiguity of the term "any property" as it is used in §1955(d), the decisive factor in determining how that term should be interpreted must be its legislative history. Unfortunately, that history is too sparse to yield a clear cut answer. However, the limited discussion of this provision that did take place seems to point to Congress' intent to reach only gambling paraphernalia and money.

Although ultimately enacted as part of the Organized Crime Control Act of 1970, Pub.L. No. 91-452, §1955(d)

traces its history back to the "Illegal Gambling Business Control Act of 1969" introduced ... as Senate Bill 2022.... This bill was eqivalent in most respects to its eventual offspring, 18 U.S.C. §1955, with one major exception -- S. 2022 contained no forfeiture provisions.... The hearings on S.2022 ... indicate that the bill was drafted by the United States Department of Justice. During these hearings, Senator McClellan, Chairman of the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, brought the lack of any forfeiture provision in the statute to the attention of Mr. Will Wilson, the Assistant Attorney General, Criminal Division, representing the Justice Department at the hearing. The relevant dialogue was as follows:

"Senator McClellan: I take it that you hope this legislation dealing with gambling will strike at the economic basis of organized crime. Now, would it be helpful to add to S. 2022 *a forfeiture provision that would cover the equipment, adding machines, and money used in operating the illegal business establishment?*

Mr. Wilson: I think it would, yes.

Senator McClellan: Give us some thoughts on this.

Mr. Wilson: Well, we will do that and submit some language on that."

Wilson followed through on this commitment by sending a letter to the committee ... with proposed wording for the forfeiture provision. The letter, which the committee made part of the record of the hearings, stated:

> "During my appearance before the Subcommittee ... I agreed at your suggestion to draft *a forfeiture provision which would cover the equipment and money used in the operation of such an illegal gambling business.*"

United States v. South Half of Lot 7 and Lot 8, supra, 876 F.2d at 1367, *quoting, Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S.976, S.1623, S. 1624, S.1861, S.2022, S.2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969) (emphasis supplied).

When §1955(d) was ultimately passed, the language defining the type of property within its scope proposed by the Department of Justice remained unscathed. *Id.* at 1367-1368.

> The references cited above are the only references in the entire legislative history which indicate the intended scope of section 1955's forfeiture provision and of the intended meaning of the pharse "any property, including money." There is no indication that Congress ever considered that the language would allow the seizure of properties beyond those specified by the Justice Department. Absolutely no mention was made of the possibility that the language could or would be used to seize real property.

Id. at 1368.

Admittedly, prior to their amendment in 1984 to explicitly include real property, real property had been forfeited under both the RICO (18 U.S.C. §1963(a)) and CCE (21 U.S.C. §§848, 853) statutes. *See, e.g., United States v. Godoy*, 678 F.2d 84 (9th Cir. 1982), *cert. denied*,

464 U.S. 959 (1983) (forfeiture of four parcels of commercial property, one unimproved lot, and residential property under RICO); *United States v. Tunnell*, 667 F.2d 1182 (5th Cir. 1982) (forfeiture of motel under RICO); *United States v. Mannino*, 635 F.2d 110 (2d Cir. 1980) (forfeiture of residence under RICO); *United States v. Grammatikos*, 633 F.2d 1013 (2d Cir. 1980) (forfeiture of discotheque-motel under CCE).

There are, however, several fundamental differences between §1955(d), on the one hand, and the forfeiture provisions of the RICO and CCE statutes, on the other hand. Most significant among these, as the panel in *United States v. South Half of Lot 7 and Lot 8, supra*, 876 F.2d at 1366, noted, is that the language of the RICO and CCE statutes "was arguably more inclusive than that at issue here." Specifically, even before the amendment which defined "property" as including realty, 18 U.S.C. §1963(b) (amend. 1984), the RICO statute provided for the forfeiture of property acquired as a result of the racketeering activity, which provided a source of influence over the enterprise, or was acquired with the proceeds of the illegal conduct.[5] By its very terms, this portion of the

5. The text of §1963(a) defines the following as subject to forfeiture:

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any (A) interest in; (B) security of; (C) claim against; (D) or property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

statute made clear that "property" was more than just personalty.

The legislative history of RICO supports this interpretation. The *raison d'etre* of that statute is to prevent the infiltration of legitimate businesses by persons engaged in organized criminal activity. Since real estate was one of the industries specifically and repeatedly mentioned by Congress as being invaded by organized crime, forfeiture of real property could be seen as furthering Congress' objectives, even before that statute was amended. *United States v. Godoy, supra*, 678 F.2d at 86-87.

The CCE statute similarly "provides for the deprivation of all profits derived from the enterprise, and the loss of all interest or property affording a source of influence over the illicit venture," *United States v. Grammatikos, supra,* 633 F.2d at 1024, as well as the forfeiture of property "used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation." *See* 21 U.S.C. §853, incorporated by reference into 21 U.S.C. §848. Like the RICO statute, the drug forfeiture laws have stated aims which, by implication, define "property" in an expansive manner. In contrast, 18 U.S.C. §1955(d) contains neither its stated goal, nor any other suggestion that it should be read expansively.

Finally, it should be noted that §1955(d) provides for *in rem* forfeiture which assumes the property to be guilty, *DiGiacomo v. United States, supra*, 346 F. Supp. at 1011, and does not address in any manner the guilt or innocence of the owner of the property. *United States v. Bonanno Organized Crime Family, supra*, 683 F. Supp. at 1460. In contrast, the RICO and CCE forfeiture provisions call for

in personam forfeiture of the interest of the person convicted under the criminal portions of those statutes. *United States v. Various Denominations of Currency, supra*, 628 F. Supp. at 6-7. Thus, the nexus between the prohibited act and the land is clearer than it is in the *in rem* context and there is more room for an expansive reading of the statute. *Cf., United States v. Property at 4492 S. Livonia Road,* 889 F.2d 1258, 1270 (2d Cir. 1989) ("[a]t some point, it seems that a forfeiture would cross the line condemning an instrumentality of crime and move into the area of punishing a defendant by depriving him of his estate").

B. The Granting Of Summary Judgement Following A Stay Of Discovery Trampled On Claimant's Due Process Rights.

This case presents a situation which would be extraordinary in any litigation between private parties, but, unfortunately, is becoming all too common in forfeiture actions. Thus, the government determined when to file the Complaint, timing it to coincide with the early stages of a grand jury investigation; then obtained a stay of discovery, alleging a need to protect the secrecy of that investigation; then moved for summary judgment, supporting that motion with affidavits of F.B.I. agents whom it knew to be protected from any form of examination—including a crucial affidavit prepared in response to claimant's arguments. In the meantime, it subpoenaed many, if not most, of claimant's witnesses to the grand jury, causing them to invoke their Fifth Amendment privilege and then resisted, as being unsupported by factual affidavits, claimant's efforts, pursuant to Rule 56(f), Fed.R.Civ.P., to argue that summary judgement was premature. In short, with the aid of the courts below, the government effectively deprived claimant of any chance to save for the Chinese-American community of Chicago a significant symbol of its heritage.

While the courts have upheld against constitutional challenge various forfeiture statutes which allow the government to prevail upon a showing of no more than probable cause—a standard of far lower than that applicable in any other civil proceeding, *United States v. Three Hundred Sixty Four Thousand, Nine Hundred Sixty Dollars,* 661 F.2d 319 (5th Cir. 1981)—and allow even innocent owners to be deprived of their property, there comes a point beyond which the government cannot constitutionally be permitted to go. *See, generally, Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 689-690 (1974); *United States v. U.S. Coin & Currency,* 401 U.S. 715, 718 (1981).

Claimant does not challenge district court's power to stay discovery in a forfeiture case. Nor does it challenge the propriety of the issuance of such a stay here. This stay operated to protect both the secrecy of the grand jury proceedings and the rights of the individuals whom one or the other side might seek to interview or depose. *Cf., United States v. One 1964 Cadillac Coupe DeVille,* 41 F.R.D. 352, 353 (S.D.N.Y. 1966) ("where both civil and criminal proceedings arise out of the same or related transactions the government is ordinarily entitled to a stay of all discovery in the civil action until disposition of the criminal matter").

Nor does claimant challenge the government's right, in the abstract, to seek summary judgement after a stay of discovery. Indeed, claimant even concedes there are situations in which it would be appropriate to grant summary judgement notwithstanding the fact that discovery was precluded. For example, if claimant had agreed that the only issue was whether or not 18 U.S.C. §1955(d) authorized the forfeiture of real property, summary judgement would have been a proper vehicle for resolving this purely legal issue.

However, in this case, claimant argued vigorously that it perceived that there might be factual issues which could form the basis of partial or total defenses to the proposed forfeiture. Under normal circumstances, the theoretical nature of these arguments would have been insufficient to defeat summary judgement. *See, e.g., United States v. One Tintoretto Painting,* 691 F.2d 603, 608 (2d Cir. 1982). But, due to the stay of discovery and the invocation of their Fifth Amendment rights by potential witnesses not in the government's sole control,[6] this was not a normal case.

Rule 56(f), Fed.R.Civ.P., contemplates the existence of just such an unusual situation and provides that

> [s]hould it appear from the affidavits of a party opposing the [summary judgement] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Courts applying this Rule have held that summary judgment should be withheld where the party opposing the motion is able to give valid reasons for its inability to present evidentiary facts in opposition. *See e.g., Londrigan v. Federal Bureau of Investigation,* 670 F.2d 1164, 1175 (D.C. Cir. 1981). *See also* 10A Wright, Miller & Kane, *Federal Practice and Procedure Civil 2d,* §2740-41. The

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6. It was undisputed below that claimant made a diligent effort to obtain affidavits from individuals with knowledge of the disputed facts, but none of those persons were free from the risk of criminal prosecution. Even immunized individuals would have risked prosecution for information given in this civil proceeding. *The Pillsbury Company v. Conboy,* 459 U.S. 248, 263-264 (1983).

commentators explain that the purpose of Rule 56(f) is to provide a shield against premature grants of summary judgment, and that, accordingly, it should be applied "with a spirit of liberality." 10A Wright, Miller & Kane, *supra,* at §2740. "A court must take care that the opponent [of the summary judgement motion] has been provided an adequate opportunity to conduct discovery." Schwarzer, *Summary Judgement Under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 F.R.D. 465, 483, *citing, First Nat. Bank v. Cities Service,* 391 U.S. 253, 297-298 (1968).

Where, as here, there has been no discovery at all, a party need not point out specific facts that it otherwise would have been able to obtain. Rather, it is sufficient that claimant has provided a valid reason for its inability to present facts at the time the motion is made. *See, generally, Toebelman v. Missouri-Kansas Pipe Line Co.,* 130 F.2d 1016, 1018, 1022 (3d Cir. 1942); *Booth v. Security Mutual Life Insurance Co.,* 155 F. Supp. 755, 762 (D.N.J. 1957); *La Cotinnier De Moislains v. H&B American Machine Co.,* 19 F.R.D. 6, 8 (D.Mass. 1956). Since Rule 56(c) presupposes discovery,[7] it is a valid reason that discovery has not yet been completed. *See, e.g., United National Records, Inc. v. MCA, Inc.,* 609 F. Supp. 33, 40 (N.D.Ill. 1984); *Concord Laboratories, Inc. v. Concord Medical Center,* 552 F. Supp. 549, 554 (N.D.Ill. 1982). Indeed, it has generally been held to be error for a court to grant summary judgement where a party has not had an opportunity to take discovery. *See e.g., Garrett v. City & County of San Francisco,* 818 F.2d 1515, 1519 (9th Cir.

7. As the Advisory Committee Notes to Rule 56 pointed out, "[t]he very mission of the summary judgement procedure is to pierce the pleadings and to *assess the proof* in order to see whether there is a genuine need for trial." (Emphasis supplied)

1987); *Martin v. D.C. Metropolitan Police Department,* 812 F.2d 1425, 1436-38 (D.C. Cir. 1987); *Glen Eden Hospital, Inc. v. Blue Cross & Blue Shield of Michigan, Inc.,* 740 F.2d 423, 428 (6th Cir. 1984); *Sam Wong & Son, Inc. v. New York Mercantile Exchange,* 735 F.2d 653, 678 (2d Cir. 1984); *Cedillo v. International Assoc. of Bridge & Structural Iron Workers,* 603 F.2d 7, 12 (7th Cir. 1979); *Harris v. Pate,* 440 F.2d 315, 318 (7th Cir. 1971).

Had the courts below applied these long-accepted precepts, claimant would not now be seeking relief from this Court but, rather, would still be awaiting the conclusion of the criminal proceedings. Unfortunately, the district court denied this motion on the ground that claimant had not detailed the "specific testimony it hopes to gain" from discovery. The Seventh Circuit agreed. (*See* p. 12a, *infra*) Claimant was thus put in the anomalous position of being required to identify what it did not know and was precluded from learning. *Cf., C-B Kenworth, Inc. v. General Motors Corp.,* 118 F.R.D. 14, 16 (D.Maine 1987) ("continuances under Rule 56(f) are particularly appropriate where . . . the facts essential to the opposing party's affidavit are within the other party's exclusive control").

To make matters worse, the courts disposed of the claims which claimant identified as potential, subject to discovery, on the merits, in some instances incorrectly, and, with respect to at least one issue—proof of a state law violation under §1955—relied on inadmissible hearsay, namely the Chicago Police Department reports. (*See* pp. 2a-3a, 7a, *infra*) These errors and improprieties combined, on the facts of this case, to violate claimant's Fifth Amendment to be free from deprivation of property without due process. *Cf., United States v. One Tintoretto Painting, supra,* 691 F.2d at 608.

Perhaps the most striking legal error made below was the holding that equitable relief in the form of less than entire forfeiture was unavailable to claimant outside the administrative process codified in 28 C.F.R., Parts 8 and 9.[8] (*See* pp. 13a-15a, *infra*) What the Seventh Circuit ignored completely is that, unlike most other forfeiture statutes, §1955(d) speaks of what a court *"may"* do and, thus, imbues a court with the discretion to decline to order, or minimize the extent of, the forfeiture. As Judge Glasser held in *United States v. Bonanno Organized Crime Family, supra,* 683 F. Supp. at 1460:

> Section 1955(d) . . . does not make forfeiture mandatory but instead provides that "[a]ny property *may* be seized and forfeited" (emphasis added). . . . Forfeiture of real property could be refused if the affected party establishes that he was "uninvolved and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."

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8. It should be noted, moreover, that the Seventh Circuit's decision also foreclosed the possibility that the discretionary administrative mitigation procedures would be fairly applied. As can be seen from the procedures of 28 C.F.R., Parts 8 and 9, the relevant portions of which are set out at pp. 28a-31a, *infra,* the United States Attorney who instituted the forfeiture proceeding is integral to a determination as to whether or not remission or mitigation should be granted. In the case at bar, this is also the same United States Attorney whose office is pursuing the parallel criminal proceedings. Claimant submits that it is unlikely in the extreme that the very same office which is advocating criminal wrongdoing on its part, can fairly and dispassionately address a plea for merciful treatment, especially since the stay of discovery precluded that plea, like the opposition to summary judgement, from being supported by any meaningful factual showing. While the administrative process is discretionary, the *de facto* deprivation of meaningful access to that process is further evidence that the courts below trampled on claimant's right to due process.

> *Calero-Toledo v. Pearson Yacht Leasing Co., [supra,]* 416 U.S. [at] 689.

Furthermore, under §1955(d),

> it would appear appropriate [for a court] to decline forfeiture where only a minor portion of the property was used for gambling, or the forfeiture, taking into account its effects on the interests of third persons, would effect a disproportionate penalty or fail to effect the purposes of forfeiture.

United States v. Various Denominations of Currency, supra, 628 F. Supp. at 8. *See also United States v. Premises and Property at 614 Portland Avenue, supra,* 670 F. Supp. at 479 ("claimants may request remission or mitigation of forfeiture either administratively . . . or address such a request to the discretion of this Court in the context of these proceedings").[9]

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9. This reading of §1955(d) is supported by its legislative history. Thus,

> The intent of section . . . 1955 . . . is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. . . . It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt State and local officials who make it possible for them to function.

H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970), 1970 U.S. Code Cong. & Admin. News 4029. The courts have affirmed this legislative purpose:

> The legislative intent of §1955 is to single out for federal prohibition "the element of gambling operations involving the corruption of local law enforcement officials . . . and to make it possible for the Federal government to intervene where local and State governments have become . . . incapable of law enforcement by reason of the corruption of responsible officials."

United States v. Dadanian, 818 F.2d 1443, 1448 (9th Cir. 1987). *See also United States v. Box,* 530 F.2d 1258, 1264 (5th Cir. 1976).

The Seventh Circuit also incorrectly held that there was no possibility that claimant could raise an argument under the Excessive Fines clause because "the Eighth Amendment does not apply to civil *in rem* actions, since they are remedial in nature and not punishments for crimes." (*See* p. 14a, *infra*) In so holding, the Circuit ignored this Court's consistent pronouncements suggesting that the Eighth Amendment could, under the right circumstances, be applicable to civil cases where the government is a party.

The Eighth Amendment provides that "excessive fines" shall not be "imposed." This Court has held that a criminal fine must be proportionate to the crime for which the defendant has been convicted. *Solem v. Helm,* 463 U.S. 277, 290 (1983). The *Solem* holding has been applied to forfeitures under the RICO statute 18 U.S.C. §1963(a), *United States v. Busher,* 817 F.2d 1409 (9th Cir. 1987), and the Department of Justice has promulgated guidelines that direct government attorneys in RICO cases to not seek forfeitures that are disproportionate to the offense. U.S. Attorneys' Manual, Title 9-110.414.

While it is true, as the Seventh Circuit noted, that, unlike the RICO forfeiture statute which is punitive in nature, §1955(d) is remedial, this Court has held, albeit in the double jeopardy context, that "in a particular case a civil penalty . . . may be so extreme . . . as to constitute punishment." *United States v. Halper,* 490 U.S. __, 109 S.Ct. 1892, 1898, 1899, (1989). "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law. . . ." *Id.* at 1901, *citing, Hicks v. Feiock,* 485 U.S. __, 108 S.Ct. 1423 (1988). While this analysis has not yet been extended to the Excessive Fines clause, in *Browning Ferris Industries v. Kelco Disposal, Inc.,* __ U.S. __, 109 Sup. Ct. 2909, 2914, 2916, 2918, 2920 (1989), this Court distinguished the situa-

tions presented when the litigants are purely private parties from those where a governmental agency is involved and suggested in dictum that, in the latter case, the Excessive Fines clause may be applicable.[10] *See also United States v. Premises Known as 3639 2nd St., N.E.*, 869 F.2d 1093, 1097 (8th Cir. 1989).

In short, while some courts have certainly rejected the applicability of the Eighth Amendment to the particular case before them, the Seventh Circuit improperly sloughed off claimant's argument that discovery might have allowed it to establish a claim under the Excessive Fines clause.

Finally, the Seventh Circuit improperly deprived claimant of the right to dispute the government's showing that the prerequisites to forfeiture under §1955 were met. It is clear beyond peradventure that only gambling activity conducted by the "illegal gambling business" violates §1955:

> The allowable unit of prosecution under §1955 is defined as participation in a single "illegal gambling business." Congress did not assimilate state gambling laws *per se* into the federal penal code, nor did it define discrete acts of gambling as independent federal offenses.

Sanabria v. United States, 437 U.S. 54, 70 (1978). Thus, the government must establish more than just the fact that

10. As the Court noted, "Justice Story was of the view that the Eighth Amendment was 'adopted as an admonition to all departments of the national government, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts.' " *Id.* at 2916 n. 9, *quoting*, 2 J. Story, *Commentaries on the Constitution of the United States* 624 (4th ed. Cooley 1873). The Stuart excesses referred to by Justice Story included the imposition of massive monetary penalties on the King's enemies, "much as the Star Chamber had done before its abolition in 1641." *Id.* at 2916.

some gambling occurred at some point, or even at several points.

Here, a large part of the government's evidence submitted in support of its summary judgment motion consisted of Chicago Police Department reports about three raids conducted several years earlier. Not only did the government provide no evidence that the arrests made had resulted in convictions—a key fact given that the gambling appeared to be on a small scale and 18 U.S.C. §1955(e) allows a not-for-profit organization to run gambling activities for fund raising purposes—but these reports were patent hearsay and, thus, inadmissible to support the motion. *See, e.g., McFeeley v. United States,* 700 F. Supp. 414, 417-418 (S.D.Ind. 1988); *Sires v. Luke,* 544 F. Supp. 1155, 1160 (S.D.Ga. 1982).

The remainder of the government's evidence consisted of the affidavits of agents Ng and Whitmer. While these certainly appeared credible on their face, such affidavits always do. However, it is naive to believe, as the Seventh Circuit seemed to indicate it did, that the credibility of these agents could not be challenged. Certainly, there is more to cross-examination, whether at a deposition or at trial, than the recantation which the courts below predicted to be unlikely. There are always questions about ability to observe and inferences drawn from observations which should be tested in some manner before summary judgement is granted.

For example, it appears that much of the activity observed by Ng was conducted in Chinese. While Whitmer asserted that Ng had the F.B.I.'s highest proficiency rating in that language, he never explained just how proficient a person with that rating must be, nor did Ng himself ever mention his abilities in that area. Likewise open to question is the number of persons observed by Ng as being in-

tegral to the operation of the games.[11] Thus, while he described a change of shift, it is not clear whether entirely new persons took over or whether the purported dealers just changed tables. Indeed, it is not at all clear just what observations led Ng to conclude that each of the particular persons he identified were, in fact, running the games and not merely gambling.

Claimant was not, in the courts below, and is not now, in a position to argue that it is entitled to relief under any of the theories set out above. Indeed, such an argument could not be made until after full discovery on the issue of claimant's participation in, or knowledge of, the alleged gambling activities and the true extent of those activities. The point, however, is that this particular claimant is in the virtually, if not totally, unprecedented position of being not only a not-for-profit corporation, but also the owner of a truly unique piece of realty to which thousands of people had access. Thus, its desire to establish innocent ownership is not mere "tilting at windmills," as it would be in the normal forfeiture case where there is a human owner with either direct involvement in the illegal activity or close contact with the premises.[10] In short, to deprive this particular claimant of the ability to establish its innocent was to deny it due process.

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11. Mere customers or peripheral personnel cannot be included in §1955's requirement of five people. *United States v. Boss*, 671 F.2d 396, 402 (10th Cir. 1982); *United States v. Morris*, 612 F.2d 483, 494 (10th Cir. 1979); *United States v. Box, supra*, 530 F.2d at 1264.

12. The government argued below that the presence of certain security equipment was indicative of the On Leong's participation in, or at least sanctioning of, the gambling business purportedly operated on its premises. What it neglected to mention, however, was that the building, which is located in close proximity to several high crime areas, contained extremely valuable furniture and artifacts, which were certainly worth protecting.

CONCLUSION

For the reasons set out above, a writ of certiorari should issue to review the judgement of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Dated: April 15, 1991

APPENDIX A
OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 90-1191
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ON LEONG CHINESE MERCHANTS ASSOCIATION BUILDING, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 5205—Ilana Diamond Rovner, *Judge.*

ARGUED SEPTEMBER 10, 1990—DECIDED
NOVEMBER 14, 1990

Before CUMMINGS, CUDAHY, and EASTERBROOK, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This is an appeal of an order granting summary judgment to the United States on a civil forfeiture claim. The property ordered forfeited is the On Leong Chinese Merchants Association Building ("Building"), a three-story landmark located in Chicago's Chinatown and owned by claimant, the On Leong Chinese Merchants Association ("On Leong"). The government alleged that the Building housed an illegal gambling business, and sought forfeiture pursuant to 18 U.S.C.§1955(d). Finding that probable cause existed to

believe that the Building was subject to forfeiture, the district court granted summary judgment for the government.

On appeal, claimant argues that the government failed to establish probable cause and that the district court improperly denied its motion for a stay of summary judgment proceedings on the Building. Claimant also contends that the forfeiture of real property, as opposed to personal property, is simply not authorized by 18 U.S.C. §1955(d). For the reasons set forth below, the district court's entry of summary judgment is affirmed.

I. BACKGROUND

The affidavit of F.B.I. Special Agent James Whitmer accompanied the government's verified complaint filed on June 15, 1988. According to Agent Whitmer, the Chicago Police Department discovered gambling activity at the On Leong Building on three separate occasions from 1984 to 1986. On September 2, 1984, police officers entered the Building with a warrant. They found the entrance to the second floor blocked by iron gates and equipped with a buzzer. Upon reaching the second floor, they observed people playing the Chinese gambling game of Fan-Tan. The officers arrested sixteen individuals and confiscated chips, buttons, dice, and an unspecified amount of currency. An February 22, 1985, officers entered forcibly with a warrant after being refused entry to the second floor. Eleven Fan-Tan players were arrested. Police recovered over $30,000 in chips and $3,805 in currency from the players and from a safe located in the adjacent cashier's room. On March 14, 1986, the officers again entered the Building with a warrant. This time they discovered gambling in the basement. They arrested eighteen people and seized currency, chips, Fan-Tan playing pieces, and two Fan-Tan cloths. The Chicago Police charged those ar-

rested on all occasions with, *inter alia,* violations of Sections 28-1 and 28-3 of Chapter 38 of the Illinois Revised Statutes.[1] Copies of police reports were filed with the district court, attached as exhibits to Agent Whitmer's affidavit.

The F.B.I. also subsequently raided the On Leong Building. F.B.I. Special Agent George Ng, who later filed his own affidavit, observed and participated in gambling games in the Building while working undercover. On April 19, 1988, after passing through a door equipped with an electronic buzzer and a closed curcuit television camera, he climbed to the second floor. There he observed the Chinese games of Fan-Tan and Pai Gow being played at separate tables. At least 50 bettors or spectators were present. Bettors wagered as much as $3,000 and $4,000 at the Pai Gow table. Agent Ng, who speaks fluent Mandarin Chinese, purchased $500 in chips from a cashier. He placed bets, receiving 90%of his winnings from a banker at the Fan Tan table. The house kept the remaining 10%. He was present during a shift change in which six new workers replaced four workers at the Fan Tan table and two at the Pai Gow Table.

Agent Ng returned on the following evening, April 20, 1988, with Agent Whitmer. The two executed a federal search warrant and interrupted similar gambling activity. One hundred people were present at the time of the search. The agents confiscated over $300,000 in currency, chips worth over $75,000, video equipment, and gambling paraphernalia. Agent Ng later identified three of those

1. Section 28-1 prohibits gambling and Section 28-3 makes it illegal for one to "knowingly permit[ ] any premises or property owned by him or under his control to be used as a gambling place." Ill. Rev. Stat. ch. 38, par. 28-1, par. 28-3 (1989).

present at the raid as corporate officers of the On Leong Chinese Merchants Association. One of the officers, Chi Chak Leung, had served as the cashier of the gambling operation, and another, Henry H. Fong, had supervised the floor.

The government filed a forteiture complaint pursuant to 18 U.S.C. §1955(d), which forbids the use of property for illegal gambling activities. Count I sought the forteiture of the defendant real property, and Count II sought forfeiture of the currency, chips, and equipment seized in the April 20, 1988 raid. On Leong filed a claim to the Building and other seized property on June 24, 1988. The government subsequently moved to stay discovery with respect to the forfeiture action because of a concurrent, related criminal investigation. After this motion was granted and discovery was stayed, the government moved for summary judgment with respect to all the property. On Leong responded by asking for a stay of summary judgment proceeding. The parties agreed to a continuance of the summary judgment motion for all seized property except the Building. The district court denied the claimant's motion for a stay with respect to the Building and granted government's summary judgment motion, ordering the forfeiture of the Building. Claimant later filed a Petition for Mitigation of Forfeiture addressed to the Attorney General, who is empowered to mitigate or remit a forfeiture. See 19 U.S.C. §*1618; 28 C.F.R.* §9.1-9.7. That petition is still pending. Claimant also filed a timely notice of appeal. Execution of the district court forfeiture decree has been stayed pending this appeal.

II. DISCUSSION

A. Probable Cause Showing

18 U.S.C. §1955 is a federal anti-gambling statute. Subsection (d) of that statute pertains to forfeiture and authorizes the seizure of "any property, including money, used in violation of the provisions of this section..."[2]

Subsection (b)(1) defines an "illegal gambling business" as:

> a gambling business which—
>
> (i) is a violation of that law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

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2. In its entirety, 18 U.S.C. §1955(d) provides that

> Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(iii) has been or remains in substantially continuous operation for a period in exess of thirty days or has a gross revenue of $2,000 in any single day.

18 U.S.C.§1955(b)(1).

Claimant argues that forfeiture is improper because the government failed to prove one of the elements of an "illegal gambling business," namely the underlying state law violation. On Leong does not challenge the government's proof of elements (ii) and (iii) of 18 U.S.C. §1955(b)(1).

The government's burden in a civil forfeiture case is merely to establish probable cause to believe that the defendant property is subject to forfeiture. In this case, the government needed to show probable cause to believe that the Building housed an "illegal gambling business." Probable cause is defined as "reasonable ground for the belief of guilt supported by less than *prima facie proof* but more than mere suspicion." *United States v. Three Hundred Sixty Four Thousand, Nine Hundred Sixty Dollars etc.*, 661 F.2d 319, 322-323 (5th Cir. 1981). Of course, probable cause must be demonstrated with respect to "every essential element" of the alleged violation. *United States v. Arias,* 575 F.2d 253, 254 (9th Cir. 1978), certiorari denied, 439 U.S. 868. Once the government demonstrates probable cause in a forfeiture case, the ultimate burden shifts to the claimant to prove by a preponderance of the evidence that the property is not subject to forfeiture. 19 U.S.C. §1615; *United States v. Edwards,* 885 F.2d 377 (7th Cir. 1989). Summary judgment ordering forfeiture is appropriate when the government establishes probable cause and the claimant fails to show that the facts constituting probable cause did not exist. *United States v. Little Al,* 712 F.2d 133 (5th Cir.1983); *United States v.*

Premises Known as 3639-2nd St., N.E., 869 F.2d 1093 (8th Cir. 1989).

Claimant challenges the method by which the government established probable cause on the "state law violation" element of 18 U.S.C. §1955(b)(1). Claimant interprets the statute to require the government to implicate the claimant in running an illegal business and to charge participants, at a minimum, with violations of state gambling laws. Under claimant's theory, the government failed to establish probable cause to believe that an "illegal gambling business" existed on the F.B.I raid of April 20, 1988, because though On Leong members were present on those days and managed aspects of the gambling, no arrests were made. Similarly, the earlier Chicago police raids supposedly failed to uncover an "illegal gambling business" because no On Leong member was present at any of the first three searches, through gamblers were arrested at those searches for violating state laws.

On Leong's argument is overly formalistic. First the presence or involvement of the claimant is simply immaterial under the statute. The language of 18 U.S.C. §1955(d) does not condition forfeiture on any suggestion that the claimant itself directed or managed the illegal gambling operation. It authorizes the forfeiture of "any property ...*used in violation* of the provision of this section." 18 U.S.C.§1955(d) (emphasis added). Though one of the preceding subsections does make it illegal to "conduct, finance, supervise, direct, or own all or part of an illegal gambling business," 18 U.S.C.§1955(a), the forfeiture subsection is not limited in application to property owned by those who themselves conduct or oversee illegal gambling businesses.

By arguing that it must be linked to the state law crime, On Leong in essence claims that innocent ownership precludes forfeiture. This argument "has almost uniformly been rejected as a defense" in the context of civil *in rem* forfeiture actions.[3] *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (seizure of a yacht justified after one marijuana cigarette discovered on board though owner/lessor was wholly innocent). "Traditionally, forfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing." *United States v. U.S. Coin and Currency*, 401 U.S. 715, 719. This is reflected in the fact that the object itself is the formal defendant. Because the object is the wrong-doer, forfeiture can be ordered even in the absence of any wrongdoing on claimant's part. Though the result for the innocent claimant is harsh, the hope is that the spectre of forfeiture will provide owners of property with an incentive to monitor the uses of their property. See *Calero-Toledo*, 416 U.S at 687-688.

On Leong also cannot assume that arrests, at a minimum, are necessary to prove that violations of state

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3. There are some extremely limited circumstances in which an innocent owner might have a valid defense to forfeiture. The Supreme Court has written in now-famous dicta that Fifth Amendment just compensation concerns might preclude a judge from ordering forfeiture if the owner proves "he was uninvolved and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689. Cases cited by the claimant speculate on the breadth of this *Calero-Toledo* exception. See *United States v. Various Denominations of Currency and Coin Totaling $4,280.45*, 628 F.Supp. 4 (S.D.W.Va. 1984); *United States v. Bonanno Organized Crime Family*, 683 F.Supp. 1411 (E.D.N.Y. 1988). Claimant does not raise any Fifth Amendment objection to the forfeiture, however, nor does it argue that it qualifies as an "innocent owner" under *Calero-Toledo*.

law occurred. The relevant burden of proof requires merely that the government establish probable cause to believe that state gambling laws were being violated. The means by which the government can do this are not limited to evidence of arrests. In this case, records of arrests were clearly relevant since the arrests were made pursuant to search warrants necessarily issued on a finding of probable cause. However, this does not mean that the government could only have shown probable cause to believe that the Building housed an illegal gambling business by introducing evidence of arrests. Any facts or evidence which might tend to establish "reasonable grounds for belief" of illegal activity are pertinent to the probable cause showing and can be presented to the district court.[4]

It is pointless to try to distinguish the first three instances of gambling from the last on the basis of whether arrests were made. On Leong argues that since during the F.B.I. raid, no state laws were violated then. Yet the same gambling game was being played on all occasions. Claimant cannot successfully argue that Fan-Tan is illegal if someone happens to get arrested but legal if undetected. If gamblers were arrested for violations of Illinois law on

4. Claimant also argues that the district court should have required more than evidence of arrests to establish that violations of state law occurred. Claimant would require the government to produce evidence of the disposition of state criminal charges. Again, claimant tries to heighten the relevant burden of proof. Forfeiture under Section 1955(d) is not predicated on criminal convictions, but on a finding of probable cause. In this case, records of arrests were relevant to the probable cause inquiry because all arrests were made pursuant to warrants issued on a finding of probable cause. Whether those arrested ultimately were brought to trial or convicted is less material. Even if charges against all those arrested were dropped, this would not necessarily undermine or preclude a finding of probable cause to seize the Building.

three occasions, it is reasonable to conclude that a violation of state law occurred later when the same conduct was observed.

The affidavits presented to the district court contained ample evidence of gambling activity to support a probable cause finding. Claimant's quibbles over the proper means of establishing a state law violation are meritless. They do not amount to a refutation of the facts constituting probable cause. Claimant never denies the observations made by Agents Ng and Whitmer, nor does it try to argue that the gambling which occurred on the premisis was legal under Illinois law. The government sustained its burden of demonstrating the absence of a genuine issue of material fact. See *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250; *Egger v. Phillips*, 710 F.2d 292, 296 (7th Cir. 1983), certiorari denied, 464 U.S. 918. The district court properly found that probable cause existed to believe that the Building was being used in violation of state gambling laws,[5] and thus in violation of 18 U.S.C.§1955.

B. Denial of Claimant's Motion for Continuance

Claimant next argues that the district court improperly denied its motion for a continuance of the forfeiture proceeding as it applied to the Building. On Leong originally moved under Rule 56(f) of the Federal Rules of Civil Procedure for a continuance of the summary judgment proceedings with respect to both the personal and real property seized by the government. It claimed that the

5. On Leong complains that the government never introduced the text of the relevant state statutes in district court. Providing the court with the citation to the relevant statute, however, is obviously sufficient. See *United States v. One (1) 1975 Thundebird*, 576 F.2d 834, 836 (10th Cir. 1978).

pendency of the related criminal investigation made it impossible to obtain evidence with which to oppose the government's motion. The stay of discovery entered upon the filing of the complaint prevented On Leong from deposing Agents Ng and Whitmer. Those whom On Leong wished to depose purportedly feared risk of criminal prosecution. The district court denied claimant's motion as it applied to the Building after the parties agreed to a stay of forfeiture proceedings with respect to the contents of the building.

On Leong claims that by deposing Agents Ng and Whitmer, it would have been able to cast doubt on the "basis, scope, and accuracy" of their statements. Amended Mem. in Support of Claimant's Rule 56(f) Motion at 5 n.2. Claimant cryptically asserts that depositions, if allowed, "could reveal that [the agents'] observation of the activities in the On Leong building ***was not as clear cut as the government would have the court believe." Appellant's Brief at 40. Apparently claimant hopes to cast doubt on the credibility of the F.B.I. agents by deposing them.

The district court's denial of a Rule 56(f) motion will not be disturbed absent an abuse of discretion in denying claimant's motion for a continuance in this case. This Circuit held in *DF Activities Corp. v. Brown*, 851 F.2d 920 (1988), that "remote possibilities do not warrant subjecting the parties and the judiciary to proceeding almost certain to be futile.'*Id.* at 922. Here, as in *DF Activities*, a party seeks to avoid the entry of an adverse judgment by raising the unlikely possibility that, upon further discovery, an adverse witness may contradict an earlier statement or volunteer an admission. Claimant never specified to the district court, nor does it identify on appeal, any information it realistically hopes to gain by

deposing these adverse witnesses. Moreover, it seems unlikely that the sworn testimony of Agents Ng and Whitmer could be shaken so badly as to rebut the probable cause showing. Their affidavits are replete with detail about the facts constituting probable cause and the basis for their conclusions.

This Court has noted that

> Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. A party invoking its protections must do so in good faith by affirmatively demonstrating why he cannot respond to movant's affidavits...*and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.*

Korf v. Ball State Univeristy, 726 F.2d 1222, 1230 (1984)(emphasis added), quoting *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 297 (8th Cir. 1975), certiorari denied, 424 U.S. 915. Here claimant failed to specify any information it could produce by deposing either adverse witnesses or witnesses under its control. Similarly claimant did not demonstrate that it would discover facts sufficient to rebut the government's showing of probable cause. Under these circumstances, the district court did not abuse its discretion in refusing claimant's Rule 56(f) motion.

On Leong renews its argument for postponement of summary judgment proceedings on appeal by raising a host of what it characterizes as "equitable" arguments. These arguments focus on the issue of whether forfeiture

of the entire Building was appropriate and fair in this case. Because none of the claimant's arguments were presented to the district court, they cannot furnish a basis for reversing the forfeiture order and remanding the case. It is well established that this Court will not consider issues on appeal not presented to the district court. *Country Fairways, Inc. v. Mottaz,* 539 F.2d 637, 642 (7th Cir. 1976). This maxim has been applied to equitable issues raised in forfeiture cases. *United States v. U.S. Currency in Amount of $103,387.27*, 863 F.2d 555, 558 n.6 (7th Cir. 1988).

Even if claimant's arguments had been properly raised in the district court, they would not support a remand because they are based on misunderstandings of the relevant law.

Claimant argues vehemently, for example, that the district court should on remand exercise its discretion to order a proportional, rather than a total, forfeiture. Claimant believes that the language of the statute, which directs that property "may" be seized, vests discretion in district courts to order proportional forfeiture.

This Court has never held that district courts can mitigate forfeitures at their own discretion. In fact, in *United States v. One 1958 Pontiac Coupe,* 298 F.2d 421 (1962), we held that the statute authorizing mitigation petitions, 19 U.S.C. §1618, vests exclusive jurisdiction over remission or mitigation of forfeitures for violation of customs laws in the executive branch. That case involved a violation of the Internal Revenue Act, 26 U.S.C. §7302. But like that statute, the illegal gambling statute at issue in this case, 18 U.S.C. §1955(d), incorporated the customs

laws to govern the forfeiture process.[6]

Claimant contends, in the alternative, that the district court lacked the power to forfeit the entire Building. It argues that this would violate the Eighth Amendment prohibition on disproportionate punishment. But courts uniformly have held that the Eighth Amendment does not apply to civil *in rem* actions, since they are remedial in nature and not punishments for crimes. *United States v. One 107.9 Acre Parcel of Land Located in Warren Township,* 898 F.2d 396, 400-401 (3rd Cir. 1990); *United States v. A Parcel of Land,* 884 F.2d 41, 43-45 (1st Cir. 1989); *United States v. Santoro,* 866 F.2d 1538, 1543-1544 (4th Cir. 1989); *United States v. Tax Lot 1500 Township 38 South, etc.*, 861 F.2d 232, 234-235 (9th Cir. 1988), certiorari denied, *Jaffee v. United States,* _____*U.S.*_____, *110 S.Ct. 364 (1989).*

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6. Claimant cites *United States v. Forty Eight Thousand, Five Hundred Ninety-Five Dollars,* 705 F.2d 909 (7th Cir. 1983), for the proposition that a civil forfeiture statute with "may" language vests discretion in the district court. *U.S. v. $48,595,* which involved 31 U.S.C. §1102(a), does not stand for this principle. Section 1102, now recodified as 31 U.S.C. §5317(b), provides that monetary instruments totalling over $5,000 "are subject to seizure and forfeiture" if not reported to customs officials upon entering the country. In that case, the district court denied claimant's motion for relief from a default judgment on the ground that claimant had no meritorious defense. On appeal, this Court could not discern whether the district court "believed [claimant] unworthy of a favorable exercise of judicial discretion or whether he found the only discretion permitted under the statute to be that of the Secretary of the Treasury." *Id.* at 914. Assuming that judicial discretion had been exercised for the sake of argument, it then continued its discussion. The Court did not endorse the proposition that judges can grant proportional forfeitures when statutes direct that property "may be seized."

Claimant's arguments about discretion and proportionality are different versions of the same complaint. At the core of On Leong's arguments is an assertion that it is unfair to seize an entire three-story building, especially one that is an historical landmark, on the basis of evidence of gambling confined to one area of the building. Claimant's characterization of the gambling activity is not supported by the record, however. The gambling was not confined to any one small area in the Building. Law enforcement officials observed organized gambling games on two different floors of the Building, the second floor and the basement, on four separate occasions. At the last raid, on April 20, 1988, nearly one hundred people were present suggesting that the Fan-Tan and Pai Gow games were set up in some sizeable room. The building itself had been modified to harbor the gambling activity, as it was equipped with a camera and electronically-activated gates to monitor outsiders. These facts do not present a compelling picture of disproportionality.

Courts have previously held that entire buildings are subject to forfeiture under 18 U.S.C. §1955(d). *United States v. Premises and Real Property at 614 Portland Avenue,* 846 F.2d 166 (2nd Cir.1988), affirming *per curiam* 670 F.Supp. 475 (W.D.N.Y. 1987)(building and property not described); *United States v. The South Half of Lot 7 and Lot 8,* 910 F.2d 488 (8th Cir. 1990)(forfeiture of 13 parcels of real estate, including buildings and residences); *U.S. v. Various Denominations of Currency,* 628 F.Supp. at 4 (forfeiture of Sportsman Tavern, a one-story masonry structure). The facts of this case establish that the gambling activity within the Building was not confined. Given the extent of the gambling activity, forfeiture of the entire Building was justified.

This case does not affort this Court an opportunity to decide the precise constitutional or statutory limits of permissible forfeiture under Section 1955(d). Some future case may present a compelling disproportionality claim. However, On Leong did not properly raise its "equitable" proportionality arguments, nor do the facts suggest that the district court ordered a forfeiture disproportionate to the illegal gambling activity. In these circumstances, claimant is not entitled to a reversal and a remand for further consideration of its proportionality arguments.

C. The Forfeiture of Real Property under Section 1955(d)

Finally, claimant argues that the Building cannot be forfeited because 18 U.S.C. §1955(d), though it allows for the forfeiture of "any property," does not specifically provide for the forfeiture of real property. Claimant believes that the legislative history of the statute supports the conclusion that Congress intended only personal property to be forfeited under the statute. This Court has not previously considered the question of whether 18 U.S.C. § 1955(d) authorizes the forfeiture of real property.

The starting point in statutory interpretation is "the language of the statute itself." *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756. Looking beyond the express language of a statute is unnecessary unless the statutory lanuage is ambiguous or where a literal interpretation would lead to an absurd result or thwart the purpose of the overall statutory scheme. See *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1313 (7th Cir. 1978).

The language of 18 U.S.C. §1955(d) is unambiguous. "Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States." 18 U.S.C. §1955(d). The

ordinary meaning of the phrase "any property" encompasses real, as well as personal, property. Black's Law Dictionary 1095 (5th ed. 1979). This Court joins the Second and Eighth Circuits in holding that the forfeiture of real property is permitted under 18 U.S.C. §1955(d). See *614 Portland Avenue*, 846 F.2d at 166; *United States v. The South Half of Lot 7 and Lot 8*, 910 F.2d at 488. Only two district courts, with which we disagree, have held that the forfeiture of land is inappropriate under the statute. See *United States v. Building and Property known as 123-125 East Twelfth St.*, 527 F.Supp. 1167 (W.D.Pa. 1981); *DiGiacomo v. United States*, 346 F.Supp. 1009 (D.Del. 1972).

The legislative history of 18 U.S.C. §1955(d) furnishes no reason to depart from the plain meaning of the statutory language. Section 1955 was passed as part of a larger piece of legislation, the Organized Crime Control Act of 1970, Pub. L. 91-452. Congressional discussions specifically about the Section 1955(d) forfeiture provision are sparse. See *614 Portland Avenue,* 670 F.Supp. at 477-478; *The South Half of Lot 7 and Lot 8,* 910 F.2d at 490-491 (containing detailed examinations of the relevant legislative history). The Senate and House Reports both recommended the "any property" language for Section 1955(d) without comment. S. Rep. No. 617, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 1549, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. Admin. News 4007. Floor debate on the forfeiture section also is limited and unenlightening. One representative did note the inclusion of:

> a forfeiture provision which will permit any property used in illegal gambling, including money to be seized and subjected to judicial forfeiture procedures. This provision will be of tremendous assistance in closing

> down gambling establishments and keeping them out of business.

116 Cong. Rec. H 32,295 (daily ed. Oct. 7, 1970) (statement of Rep. Poff). This comment provoked no further discussion.

Since the passage of the Organized Crime Control Act (OCCA), the forfeiture provisions of two closely-related statutes have been held to provide for the seizure of land and buildings, though, like Section 1955, neither originally specifically mentioned real property. The Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §1961 *et seq.*, was passed as part of the OCCA, and provided for the forfeiture of "any . . . property . . . of any kind" belonging to those convicted of racketeering. 18 U.S.C. §1963(a) (1982). The Continuing Criminal Enterprise (CCE) statute, 21 U.S.C. §848, enacted in the same year as the OCCA, used identical language to authorize the seizure of property used in drug-related continuing criminal enterprises. 21 U.S.C. §848(a)(2) (1982). The original forfeiture provisions in both statutes, though neither made reference to real property, were interpreted to allow the forfeiture of real property. See *United States v. Godoy,* 678 F.2d 84 (9th Cir. 1982), certiorari denied, 464 U.S. 959 (RICO); *United States v. Tunnell*, 667 F.2d 1182 (5th Cir. 1982) (RICO); *United States v. Mannino*, 635 F.2d 110 (2d Cir. 1980) (CCE); *United States v. Grammatikos*, 633 F.2d 1013 (2d Cir. 1980) (CCE).

Claimant makes much of the fact that Congress amended the RICO and CCE statutes in 1984 to allow explicitly for the forfeiture of real property, in spite of the above-cited cases holding that such forfeitures were contemplated by the statute. Claimant reasons that Congress' failure to amend 18 U.S.C. §1955(d) at the same time in-

dicates its desire to exclude real property from that section's scope. This Court finds claimant's argument unpersuasive. Only the "most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language." *Garcia v. United States*, 469 U.S. 70. In the absence of any direct evidence of Congressional intent, claimant's interpretation of Congress' actions in 1984 amounts to speculation. It would furnish only an infirm basis upon which to contradict clear statutory language.

Finally, the purpose of 18 U.S.C. §1955(d) is best served by allowing the forfeiture of real estate as well as personal property. The Organized Crime Control Act was a comprehensive set of legislation which recognized that "organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling," S. 30, 91st Cong., 2d Sess. (1970), and thus sought to "strike[] at the economic roots or organized crime." 116 Cong. Rec. S 602 (1970). The Supreme Court has held that forfeiture statutes enacted

> to suppress a public wrong, . . . although they impose penalties or forfeitures, [are] not to be construed, like penal laws generally, strictly in favor of the defendant, but . . . are to be fairly and reasonably construed, so as to carry out the intention of the legislature.

United States v. Stowell, 133 U.S. 1, 12. Allowing the forfeiture of buildings and land that house illegal gambling operations, as well as the equipment and currency that may be within, best advances the stated goal of the statute.

III. CONCLUSION

This Court is mindful that the forfeiture remedy is harsh. In this case, however, the government met its burden of proving that there was no genuine issue of material fact. Moreover, forfeiture of the defendant real property is permitted under 18 U.S.C. §1955(d). The district court's entry of summary judgment is therefore affirmed.

CUDAHY, *Circuit Judge,* concurring:

I concur in the judgment and in Judge Cummings' careful opinion. I write separately only to emphasize that the most difficult questions presented by this appeal need not be addressed because they have been waived. Under other circumstances, the government's constitutional arguments here might appear overly expansive. For example, at oral argument the government suggested that 18 U.S.C. §1955 would authorize it to seize the King Ranch, a legendary Texas spread covering hundreds of square miles, were it to detect an illegal crap game in one stable. Such a broad construction of the statute--if seriously espoused--could raise significant constitutional questions.[1]

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1. Although the case before us does not afford the opportunity to determine the precise parameters of permissible forfeiture under section 1955, it is certainly not clear that the statutory reach is virtually unlimited. The government relies upon the body of law construing the drug forfeiture statute, 21 U.S.C. §881, to support its expansive reading of section 1955. Unlike section 1955, however, section 881 specifically authorizes forfeiture of an entire tract of land regardless of the magnitude of the infraction. *See* 21 U.S.C. §881(a)(7) (1990) (authorizing forfeiture of "[a]ll real property, including any right, title, and interest . . . in the whole of any lot or tract of land . . . used, or intended to be used, in any manner or part, to commit" a violation).

Civil forfeiture actions have traditionally proceeded upon the theory that property devoted to criminal activity may itself be found guilty of wrongdoing. See *United States v. U.S. Coin & Currency*, 401 U.S. 715 (1971). The Supreme Court has occasionally pierced this legal fiction, however, to recognize the quasi-criminal nature of *in rem* actions and accord them fourth and fifth amendment protections generally reserved for criminal proceedings. *E.g., id.* at 718 (acknowledging that " 'proceedings instituted for the purpose of declaring the forfeiture of a man's property by *reason of offences* [sic] *committed by him*, though they may be civil in form, are in their nature criminal' for Fifth Amendment purposes") (quoting *Boyd v. United States,* 116 U.S. 616, 634 (1886) (emphasis supplied in *Coin & Currency)*); *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1964); *Boyd v. United States,* 116 U.S. 616 (1886). The Constitution may not be implicated when the government merely confiscates property directly tied to a crime, such as a gun or a car. But I agree with the Second Circuit that "[a]t some point, it seems that a forfeiture would cross the line of condemning an instrumentality of crime and move into the area of punishing a defendant by depriving him of his estate." *United States v. Property at 4492 S. Livonia Road*, 889 F.2d 1258, 1270 (2d Cir. 1989). In this regard, the Supreme Court has in recent years eschewed the rigid labels of "civil" or "criminal" when examining significant constitutional interest. See *United States v. Halper*, 109 S.Ct. 1892, 1901 (1989) ("the labels 'criminal' and 'civil' are not of paramount importance . . . [for][i]t is commonly understood that civil proceedings may advance punitive as well as remedial goals"). The Court has instead attempted to plumb the underlying nature of the proceeding and evaluate the purposes actually served by the sanction to determine whether it constitutes criminal punishment for the purpose, for example, of double

jeopardy clause analysis. See *id.* at 1901-1902 (holding that a civil sanction constitutes "punishment" when it further the dual goals of punishment-retribution and deterrence).

When the government exacts a forfeiture grossly disproportionate to the offense, eighth amendment analysis may be applicable even to a nominally civil proceeding. See *United States v. Real Estate Known as 916 Douglas Ave.*, 903 F.2d 490, 495 (7th Cir. 1990) (Flaum, J., concurring) (observing that "there might be situations where the application of the broadly-written [drug forfeiture] provision would raise eighth amendment concerns); *United States v. Property at 4492 S. Livonia Road,* 889 F.2d 1258, 1270 (2d Cir. 1989) (same); *United States v. Premises Known as 3639-2nd St.*, 869 F.2d 1093, 1098 (8th Cir. 1989) (Arnold, J., concurring) (noting that "one can imagine applications of the forfeiture statutes that would be so draconian as to violate the Excessive Fines Clause"). *Cf. Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2920 (1989) (suggesting that the eighth amendment's excessive fines clause may apply to civil actions by the government to extract exorbitant forfeitures). It would defy common sense to prohibit disproportionate forfeiture of the property of a defendant who has been convicted of a criminal violation, *see, e.g., United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987) (finding the eighth amendment applicable to criminal forfeiture proceedings), while placing no limits on the power of government to seize any real estate related to an offense in an ostensibly civil *in rem* action.

Seizure of the On Leong building may not be disproportionate to the gambling offense here. It is, however, a three-story landmark structure with an unusual cultural history and substantial economic value. A

forfeiture of this genre and magnitude may be authorized and appropriate, but it seems to me to mark a significant departure in the enforcement of 18 U.S.C. §1955.

APPENDIX B
PERTINENT PARTS OF RELEVANT STATUTES, CONSTITUTIONAL PROVISIONS, AND REGULATIONS

18 U.S.C. §1955 PROHIBITION OF ILLEGAL GAMBLING BUSINESSES

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section-

(1) "illegal gambling business" means a gambling business which-

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finanace, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures,

probable cause that the business received gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

(added Publ. 91-452, Title VIII, §803(a), Oct. 15, 1970, 84 Stat. 937)

AMENDMENT V--DUE PROCESS AND JUST COMPENSATION

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

RULE 56, FED.R.CIV.P., SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory jdugment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by in-

terrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached teto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

28 C.F.R. §93, PROCEDURE RELATING TO PETITIONS IN JUDICIAL FORFEITURES.

(a) A petition for remission or mitigation of judicial forfeiture shall be addressed to the Attorney General, and shall be sworn to by the petitioner, or by petitioner's counsel upon information and belief, and shall be submitted in triplicate to the U.S. Attorney for the judicial district where the forfeiture proceedings are brought. A copy of the petition shall be submitted also to the local or regional office of the seizing agency that covers the judicial district in which the seizure occurred, except in DEA cases where the petition shall be submitted to DEA headquarters, Office of Chief Counsel.

(b) Petitions shall be sworn and shall include the following information in clear and concise terms:

(1) A complete description of the property, including model and serial numbers, if any, and the date and place of seizure:

(2) The interest of the petitioner in the property, as owner, mortgagee or otherwise, to be supported by bills of sale, cotracts, mortgages, or other satisfactory documentary evidence: and

(3) Upon receipt of a petition, the U.S. Attorney shall direct the seizing agency to investigate the merits of the petition and to submit a report thereon. Upon receipt

of such report, the U.S. Attorney shall forward a copy thereof together with the petition and a recommendation as to allowance or denial of the petition to the Director, Asset Forfeiture Office, Criminal Division.

(d) Upon receipt of a petition and report thereon, the Asset Forfeiture Office of the Criminal Division shall prepare a report based upon the allegations of the petition and the report of the seizing agency. No hearing shall be held. Upon the basis of the report prepared in this Office, the Director of the Office shall either grant the petition by remission or mitigation of the forfeiture or shall deny it.

(e) If the Director, Asset Forfeiture Office, grants a petition or otherwise mitigates the forfeiture, appropriate notices of such action shall be mailed to the petitioner or petitioner's attorney, to the appropriate U.S. Attorney, the U.S. Marshals Service, and the appropriate seizing agency. The U.S. Attorney shall be advised of the terms and conditions, if any, upon which the remission or mitigation is granted and the procedures to be followed in order for the petitioner to obtain a release of the property, or, in the case of a chattel mortgagee, and at the petitioner's option, to obtain his net equity in said property. The Director of the Office shall advise the petitioner or petitioner's attorney to confer with the U.S. Attorney as to such terms and conditions. The U.S. Attorney shall confer with the office of the agency which submitted the report on the petition regarding the release and shall coordinate disposition of the property with that office and the U.S. Marshals Service.

(f) If the Director, Asset Forfeiture Office, denies a petition, appropriate notices of such action shall be mailed to the petitioner or petitioner's attorney, to the appropriate U.S. Attorney, and to the appropriate seizing agency. Such notice shall specify the reason that the petition was denied. The notice also shall advise the petitioner or petitioner's attorney that a request for reconsideration

of the denial of the petition may be submitted to the Director, Asset Forfeiture Office, in accordance with paragraphs (k) through (n) of this section.

28 C.F.R. §9.5 CRITERIA GOVERNING REMISSION AND MITIGATION.

(a) The Determing Official shall not consider whether the evidence is sufficient to support the forfeiture but shall presume a valid forfeiture.

(b) *Remission.* The Determining Official shall not remit a forfeiture unless the petitioner establishes:

(1) That petitioner has a valid, good faith interest in the seized property as owner or otherwise: and

(2) That petitioner had no knowledge that the property in which petitioner claims an interest was or would be involved in any violation of the law: and

(3) That petitioner had no knowledge of the particular violation which subjected the property to seizure and forfeiture: and

(4) That petitioner had no knowledge that the user of the property had any record for violating laws of the U.S. or of any State for a related crime: and

(5) That petitioner had taken all reasonable steps to prevent the illegal use of the property.

(c) *Mitigation.* In addition to having the discretionary authority to grant relief by way of complete remission of forfeiture, the determing official may, in the exercise of discretion, mitigate forfeitures of seized property. This authority may be exercised in those cases where the petitioner has not met the minimum conditions precedent to remission but where there are present other extenuating circumstances indicating that some relief should be granted to avoid extreme hardship. Mitigation may also be granted where the minimum standards for remission have been satisfied but the overall circumstances are such

that, in the opinion of the determining official, complete relief is not warranted. Mitigation shall take the form of a money penalty imposed upon the petitioner in addition to any other sums chargeable as a condition to remission. This penalty is considered as an item of cost payable by the petitioner, and shall be deposited as an amount realized from forfeiture in accordance with 28 U.S.C. 524(c).

(2)

No. 90-1630

FILED
JUN 13 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

ON LEONG CHINESE MERCHANTS ASSOCIATION BUILDING, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1955(d), which provides for the forfeiture of "any property, including money" used in violation of Section 1955, authorizes the forfeiture of real property.

2. Whether the district court abused its discretion in denying petitioner's motion for a continuance of summary judgment proceedings under Federal Rule of Civil Procedure 56(f).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 918 F.2d 1289. The opinion of the district court granting the government's motion for summary judgment (App., *infra*, 1a-4a), and its order denying petitioner's motion for a continuance (App., *infra*, 5a-7a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1990. On February 7, 1991, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 15, 1991, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1988, the United States brought a federal court action seeking forfeiture of petitioner, the On Leong Chinese Merchants Association Building located in Chicago, Illinois. The complaint alleged that the building had been used for an illegal gambling operation, in violation of 18 U.S.C. 1955. The complaint also sought forfeiture of $323,427.96 in cash, cashiers checks totalling $2,500, gambling chips and other gambling paraphernalia, and video equipment. Pet. App. 4a.

The affidavit of FBI Special Agent James Whitmer, which was attached to the complaint, detailed the grounds for forfeiture. On September 2, 1984, Chicago police officers entered the building with a warrant and found several persons playing the gambling game of Fan-Tan on the second floor. The officers arrested 16 persons and confiscated gambling equipment and cash. Five months later, on February 22, 1985, police officers again raided the building. On this occasion, the officers arrested 11 persons who were playing Fan-Tan on the second floor, and seized gambling equipment, chips, and cash. One year later, police officers returned to the building and discovered a gambling operation in the building's basement. On that occasion in March 1986, the officers arrested 18 persons and seized Fan-Tan gambling equipment, gambling chips, and cash. Pet. App. 2a.

The government learned more about the continued gambling operations in the building as a result of a visit by an undercover FBI agent. On April 19, 1988, the agent entered the second floor of the building through a door equipped with closed circuit television

and an electronic buzzer. He saw at least 50 persons playing Fan-Tan and another game, Pai-Gow, for stakes as high as $4,000; he counted at least six persons working at the gambling tables. The agent purchased $500 in chips and placed bets. When the agent won, he received 90% of his winnings; the house kept the remaining 10%. Pet. App. 3a.

On the following evening, FBI agents executed a warrant to search the building. When they entered the building, over 100 persons were gambling. The agents seized more than $300,000 in cash, gambling chips worth $75,000, video equipment, and gambling paraphernalia. During this raid, the agents saw three corporate officers of the On Leong Chinese Merchants Association present in the gambling room. Pet. App. 3a-4a.

2. In response to the government's action, the On Leong Chinese Merchants Association filed a claim to the building and initiated discovery proceedings.[1] The government later successfully moved to stay discovery pending completion of an ongoing criminal investigation. In September 1988, the government—based on the information outlined above—filed a motion for summary judgment with respect to forfeiture of the building and other seized property. Petitioner then filed a motion for a continuance of summary judgment proceedings under Federal Rule of Civil Procedure 56(f). Pet. App. 4a.[2]

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[1] We will refer to the Association and the building collectively as petitioner.

[2] Fed. R. Civ. P. 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judg-

In May, 1989, the district court denied petitioner's motion to stay proceedings related to the building. Pet. App. 4a; App., *infra*, 5a-7a.[3] The court found that

> the affidavits presented by the government * * * are replete with detail concerning the circumstances which the government argues constitute probable cause. [Petitioner] has identified no specific testimony that it hopes to gain from deposing the affiants; it rests on general arguments that it may be able to establish information concerning the "basis, scope and accuracy of their observations" which would make the affidavits less credible.

Id. at 6a-7a. "In light of the detail already presented in the affidavits," the court concluded, petitioner's request for additional discovery was unwarranted. *Id.* at 7a. (citing *DF Activities Corp* v. *Brown*, 851 F.2d 920 (7th Cir. 1988)). Moreover, the court held that petitioner's alleged inability to obtain information from its own witnesses because of the pending criminal investigation was not "a valid basis for interrupting the civil action." App., *infra*, 7a. In the court's view, petitioner's position amounted to an argument that "it possesses the relevant information but is unwilling or unable to submit it." *Ibid.*

3. In October 1989, the district court granted the government's motion for summary judgment and ordered the building forfeited. App., *infra*, 1a-4a. The

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ment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[3] The government agreed with petitioner to stay summary judgment proceedings with respect to the other seized property. Pet. App. 4a.

court first rejected petitioner's contention that 18 U.S.C. 1955(d), which allows for the forfeiture of "any property" used in violation of Section 1955, did not authorize the forfeiture of real property. App., *infra*, 2a (citing cases).[4] The court next held that the government had established probable cause to believe that the building was being used for illegal gambling in violation of Section 1955. In particular, the court determined that the government had shown that the building was used as "an illegal gambling business" within the meaning of Section 1955(b)(1), *i.e.*, "that the business have a gross revenue of $2000 in a single day." App., *infra*, 3a. The court pointed to the government's uncontroverted submission that the undercover FBI agent "witnessed six bettors at one table placing wagers of as much as $3000 to $4000, and 25 to 30 bettors at another table placing wagers of as much as $1500 to $2000." *Ibid.*[5]

4. The court of appeals affirmed. Pet. App. 1a-23a. It rejected petitioner's contention that the district court had improperly denied the motion for a continuance under Fed. R. Civ P. 56(f). The court of appeals found that petitioner

> failed to specify any information it could produce by deposing either adverse witnesses or witnesses under its control. Similarly [petitioner] did not demonstrate that it would discover facts

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[4] Section 1955(d) provides in pertinent part:

> Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States.

[5] The court of appeals upheld the district court's probable cause determination, Pet. App. 5a-10a, and petitioner has not sought further review of that issue.

> sufficient to rebut the government's showing of probable cause.

Pet. App. 12a. "Under these circumstances," the court held, "the district court did not abuse its discretion in refusing [petitioner's] Rule 56(f) motion." *Ibid.*

The court also rejected petitioner's contention that Section 1955(d) does not authorize the forfeiture of real property. The court determined that the language of the statute—"[a]ny property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States" (18 U.S.C. 1955(d))—is "unambiguous." Pet. App. 16a. Moreover, the court reviewed the pertinent legislative history and concluded that it "furnishes no reason to depart from the plain meaning of the statutory language." *Id.* at 17a. Finally, the court pointed out that the "purpose of 18 U.S.C. § 1955(d) is best served by allowing the forfeiture of real estate as well as personal property." Pet. App. 19a.[6]

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[6] Judge Cudahy filed a concurring opinion. In his view,

> [s]eizure of the On Leong building may not be disproportionate to the gambling offense here. It is, however, a three-story landmark structure with an unusual cultural history and substantial economic value. A forfeiture of this genre and magnitude may be authorized and appropriate, but it seems * * * to mark a significant departure in the enforcement of 18 U.S.C. § 1955.

Pet. App. 22a-23a.

ARGUMENT

1. Petitioner contends (Pet. 9-19) that Section 1955(d) does not provide for the forfeiture of real property. Section 1955(d) authorizes the forfeiture of "any property * * * used in violation" of Section 1955. "When used without qualification, the word 'property' includes both real and personal property within its sweep." *United States* v. *South Half of Lot 7 & Lot 8*, 910 F.2d 488, 489 (8th Cir. 1990) (en banc) (citing *Fidelity & Deposit Co.* v. *Arenz*, 290 U.S. 66, 68 (1933)), cert. denied, 111 S. Ct. 1389 (1991). In addition, Congress's use of the word "any" to modify "property" shows that it intended a broad construction of that term. See *United States* v. *James*, 478 U.S. 597, 605 (1986).[7]

Where, as here, the statutory language is unambiguous, "judicial inquiry is complete except in rare and exceptional circumstances." *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 604 (1991). In this case, application of the plain terms of the statute does not produce a result "demonstrably at odds with the intentions of its drafters." *Griffin* v. *Oceanic Contrac-*

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[7] Petitioner seeks to avoid the straightforward application of the statutory terms by asserting that real property, such as a building, "is not actually used 'in violation' of the provisions of § 1955(a)." Pet. 13. That effort falls short the mark where, as here, the record shows that patrons used the seized building as a gambling hall for at least several years.

Petitioner also argues (Pet. 13-14) that Congress's incorporation into Section 1955(d) of customs law procedures applicable exclusively to personal property shows that Congress did not intend to allow forfeiture of real property under Section 1955(d). That argument fails, however, because Congress has incorporated these procedures into several other forfeiture provisions that plainly apply to real property. See *United States* v. *South Half of Lot 7 & Lot 8*, 910 F.2d at 491.

tors, Inc., 458 U.S. 564, 571 (1982). There is therefore no occasion for the Court to accept petitioner's invitation (Pet. 14-15) to look beyond the plain language of Section 1955, which unambiguously authorizes forfeiture of the property at issue here.

In any event, petitioner's invitation amounts to analyzing one exchange between Senator McClellan, the Chairman of the Senate subcommittee considering the original version of Section 1955(d), and the Assistant Attorney General of the Criminal Division of the Department of Justice. Senator McClellan suggested to the Assistant Attorney General that "a forfeiture provision that would cover the equipment, adding machines, and money used in operating the illegal [gambling] establishment" would be "helpful" in achieving the purpose of the statute. See Pet. 15-16 (quoting *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 397 (1969)). The Assistant Attorney General agreed, and the Department of Justice later proposed legislation that became Section 1955(d) This brief exchange, involving one member of Congress, scarcely shows that Congress intended to exclude real property from the reach of the statute.

Finally, both of the other courts of appeals that have considered this issue have agreed with the court below in construing Section 1955 to reach real property. See *United States* v. *South Half of Lot 7 & Lot 8, supra; United States* v. *The Premises & Real Property at 614 Portland Ave.*, 846 F.2d 166, 167 (2d Cir. 1988) (per curiam), aff'g 670 F. Supp. 475

(W.D.N.Y. 1987). Further review is therefore unwarranted.[8]

2. Petitioner also contends (Pet. 19-29) that the district court erred in denying its motion for a continuance of summary judgment proceedings under Federal Rule of Civil Procedure 56(f). Rule 56(f) allows the district court to order a continuance of summary judgment proceedings when the party opposing a motion for summary judgment "cannot for reasons stated present by affidavit facts essential to justify [its] opposition." To obtain such a continuance, a party must identify the information it needs to oppose summary judgment and explain how that information would create a genuine issue of material fact sufficient to preclude summary judgment. See *Garrett* v. *City & County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987); *Korf* v. *Ball State University*, 726 F.2d 1222, 1229-1330 (7th Cir. 1984); *Wilmar Poultry Co.* v. *Morton-Norwich Products, Inc.*, 520 F.2d 289, 297 (8th Cir. 1975), cert. denied, 424 U.S. 915 (1976).

In this case, the government's affidavits showed that the building had been used regularly as a gambling establishment from 1984 until its seizure in April 1988. See Pet. App. 2a-4a.[9] The government

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[8] Petitioner claims (Pet. 9-10) that review is necessary to resolve a conflict between the three courts of appeals that have held that Section 1955(d) extends to real property and two district courts that have come to the opposite conclusion. Such review would be premature until a conflict over the issue developed among the courts of appeals.

[9] In addition to Agent Whitmer's affidavit, the government submitted the affidavit of the undercover agent who visited the building and participated in illegal gambling the night before the search.

therefore established ample probable cause to believe that the building was being used in violation of Section 1955.[10] In the face of this record, petitioner claims (Pet. 24-25) that discovery might have enabled it to develop equitable reasons why the district court should not have ordered forfeiture.[11] As the court of appeals pointed out, however, "the statute authorizing mitigation petitions, 19 U.S.C. § 1618, vests exclusive jurisdiction over remission or mitigation of forfeitures * * * in the executive branch." Pet. App. 13a; see *United States* v. *One Clipper Bow Ketch Nisku*, 548 F.2d 8, 12 (1st Cir. 1977); *United States* v. *One 1958 Pontiac Coupe*, 298 F.2d 421, 423 (7th Cir. 1962). Thus, the district court could not have granted petitioner relief even if it had come forward with equitable reasons supporting a remission of forfeiture. In any event, even if the district court had the authority to decline to order the building forfeited, that decision would depend on factors external to the government's showing of probable cause, *i.e.*, the nature, history, and use of the building. Petitioner did not need discovery to develop a record regarding these factors.

Petitioner also contends (Pet. 26-27) that additional discovery would have allowed it to develop an argument that the building's forfeiture violated the Excessive Fines Clause of the Eighth Amendment. Even if petitioner were correct that the Excessive

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[10] Section 1955(b)(1) defines an illegal gambling establishment as one operating in violation of state gambling laws, employing five or more persons, and continuing over 30 days. See Pet. App. 2a-3a.

[11] Petitioner did not raise this contention before the district court—a procedural default recognized by the court of appeals. See Pet. App. 13a.

Fines Clause applies to civil in rem forfeitures, but see Pet. App. 14a (citing cases), it is difficult to see how additional discovery would have allowed petitioner to develop this claim. Nor does petitioner explain what information it could have obtained through discovery that would have been relevant to this claim. Such a speculative claim does not warrant a continuance under Rule 56(f).

Lastly, petitioner argues (Pet. 27-29) that discovery would have allowed it to develop a defense on the merits of the forfeiture action. In particular, petitioner claims that depositions of the government's affiants would have uncovered facts that would have created a material issue of fact regarding whether an "illegal gambling operation" within the meaning of Section 1955 was being held in the building. According to petitioner, "[t]here are always questions about ability to observe and inferences drawn from observations which should be tested in some manner before summary judgment is granted." Pet. 28.

Rule 56(f), as the courts below recognized, does not provide a vehicle for a party opposing summary judgment to engage in a fishing expedition in the hope that some evidence adverse to the moving party will emerge. Petitioner has pointed to no substantive evidence that it seeks to obtain that would controvert the government's showing of probable cause to believe that the building was being used in violation of Section 1955. Petitioner merely seeks to depose the government's affiants with the wish that they will contradict their affidavits or otherwise provide information adverse to the government. The government's evidentiary submissions, however, detailed the gambling activities at the building. In fact, petitioner has abandoned its challenge to the government's probable

cause showing. See note 5, *supra*. In these circumstances, the district court exercised sound discretion in rejecting petitioner's request for a continuance under Rule 56(f).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1991

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88 C 5205

UNITED STATES OF AMERICA, PLAINTIFF

v.

ON LEONG CHINESE MERCHANTS
ASSOCIATION BUILDING, ET AL., DEFENDANTS

[Filed Oct. 13, 1989]

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

In this action, the government seeks the forfeiture of the On Leong Chinese Merchants Association Building (the "Building"), cash, and various other items allegedly used in violation of 18 U.S.C. § 1955. The government moved for summary judgment on September 22, 1988. The claimant then moved for a continuance of summary judgment proceedings pursuant to Fed.R.Civ.P. 56(f). The government agreed to such a continuance with respect to all of the defendant properties with the exception of the Build-

ing. On May 9, 1989, the Court determined that summary judgment proceedings should proceed with respect to the Building, and it set a briefing schedule. Pending, then, is the motion for summary judgment with respect to the Building.

Claimants first argue that the Building is not subject to forfeiture under § 1955 because, although the statute provides that "any property" may be seized, it does not specifically provide for the forfeiture of real property. The majority of the courts which have considered whether real property is forfeitable under § 1955 have answered that question in the affirmative. *See United States v. Premises and Real Property at 614 Portland Ave.*, 846 F.2d 166, 167 (2d Cir. 1988), *aff'g per curiam*, 670 F.Supp. 475 (W.D.N.Y. 1987); *United States v. Various Denominations of Currency and Coin Totalling $4280.45*, 628 F.Supp. 4 (S.D.W. Va. 1984); *United States v. Bonanno Organized Crime Family*, 683 F.Supp. 1411, 1458-60 (E.D.N.Y. 1988), *aff'd on other grounds*, 879 F.2d 20 (2d Cir. 1989). *But see United States v. Building & Property known as 123-125 East Twelfth St.*, 527 F.Supp. 1167 (W.D. Pa. 1981) (real property not subject to forfeiture); *DiGiacomo v. United States*, 346 F. Supp. 1009 (D. Del. 1972) (same). The claimants cite only *United States v. South Half of Lot 7 and Lot 8*, 876 F.2d 1362 (8th Cir. 1989), which held that real property is not subject to forfeiture. However, after the motion for summary judgment was fully briefed, the Eighth Circuit vacated that order pending rehearing en banc. *United States v. Unit No. 7 and Unit No. 8 of Shop*, 883 F.2d 53 (8th Cir. 1989). This Court agrees with the majority view and holds that real property is forfeitable under § 1955.

The claimants next argue that the government has not established probable cause in this case. The claimants focus on § 1955(b)(1)(iii), which requires, for purposes of this case, that the business have a gross revenue of $2000 in a single day.[1] The claimants argue that the affidavits submitted by the government do not establish probable cause to believe that $2000 in gross revenue was received in a single day. Initially, the Court notes that gross revenue, for purposes of § 1955, is defined as the total amount of money wagered rather than net profit. *See United States v. Zemek*, 634 F.2d 1159, 1177 (9th Cir. 1980), *cert. denied*, 450 U.S. 916, 101 S.Ct. 1359 (1981); *United States v. Rotchford*, 575 F.2d 166, 174 (8th Cir. 1978). In this case, FBI Special Agent George Ng states in his affidavit that he witnessed six bettors at one table placing wagers of as much as $3000 to $4000, and 25 to 30 bettors at another table placing wagers of as much as $1500 to $2000. The claimants have submitted no evidence which would tend to show that the $2000 gross revenue requirement has not been met.[2] Agent Ng's uncontroverted

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[1] Section 1955(b)(1) provides:

> "[I]llegal gambling business" means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

[2] The claimants argue that the pendency of a criminal investigation has interfered with their ability to present evidence. This argument was rejected in the Court's minute order of

affidavit clearly establishes probable cause to believe that the gross revenue requirement was established.

The Court finds that the government has established probable cause to believe that the defendant Building is subject to forfeiture. The government's motion for summary judgment with respect to the Building is therefore granted.

ENTER:

/s/ Ilana Diamond Rovner

ILANA DIAMOND ROVNER
United States District Judge

Dated: October 13, 1989

May 9, 1989, and the Court does not find that the claimed inability to present evidence, in the circumstances of this case, precludes entry of summary judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88 C 5205

UNITED STATES

v.

ON LEONG CHINESE ASSOCIATION
BUILDING, ET AL.

[Filed May 9, 1989]

ORDER

This is a civil forfeiture action involving the On Leong Chinese Merchants Association Building (the "Building"), cash, and various other items allegedly used in violation of U.S.C. § 1955, which prohibits illegal gambling businesses. The government moved for summary judgment on September 27, 1988. That motion has not been fully briefed. Rather than filing a response, claimant moved for a continuance of summary judgment proceedings pursuant to Fed. R. Civ. P. 56(f). The government agreed to such a continu-

ance with respect to all of the defendant properties with the exception of the Building.

With respect to the Building, the government argued that a continuance was not warranted, relying on *DF Activities Corp. v. Brown*, 851 F.2d 920 (7th Cir. 1988). In that case, the defendant in a contract dispute moved for dismissal on the basis of a statute of frauds defense, and submitted an affidavit denying that she had entered into the alleged contract. The plaintiff argued that it should have an opportunity to engage in discovery. The court of appeals, affirming the district court, held that dismissal was proper and that there was no point in keeping the lawsuit alive in light of the unlikelihood that the defendant would testify in a deposition contrary to the statements in her affidavit. 851 F.2d at 922. Judge Flaum, in dissent, agreed that the district courts have broad discretion to determine the limits of permissible discovery, but argued that the dismissal should have been vacated because the affidavit did not contain a blanket denial that any agreement was reached. 851 F.2d at 925. Thus deposing defendant "would not necessarily be a futile effort." *Id.*

Claimant argues that *DF Activities* is inapplicable here because claimant wishes "to depose the government's affiants, not in order to trick them into reversing their positions, but to ascertain the basis, scope, and accuracy of their observations." (Amended Mem. in Support of Claimant's Rule 56(f) Motion at 5 n.2.) The Court disagrees, and finds that the circumstances here support proceeding with the summary judgment motion even more so than in *DF Activities*. In contrast to the evasive affidavit at issue in *DF Activities*, the affidavits presented by the government in this case are replete with detail concerning the circumstances which the government ar-

gues constitute probable cause. Claimant has identified no specific testimony that it hopes to gain from deposing the affiants; it rests on general arguments that it may be able to establish information concerning the "basis, scope and accuracy of their observations" which would make the affidavits less credible. In light of the detail already presented in the affidavits, depositions with those goals would be at least as futile as the deposition of the defendant in *DF Activities*.

Claimant also argues that the stay of discovery prevents it from obtaining affidavits from the persons within its own control, because those persons may be at risk in the criminal prosecution. This is an argument entirely unrelated to the stay of discovery itself. Claimant essentially argues that it possesses the relevant information but is unwilling or unable to submit it. The Court does not find this to be a valid basis for interrupting the civil action.

Accordingly, the Court will proceed with the government's motion for summary judgment. Claimant's response to the motion is due June 6, 1989. The government's reply is due July 7, 1989.

/s/ Ilana D. Rovner

ILANA D. ROVNER

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